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Proposals and contributions received from Governments

Japan: Non-paper

I. Overview

1. Corruption is the most serious obstacle to democracy and sound economic development. In order to fight corruption, international cooperation is indispensable. Therefore, the proposed convention should provide for concrete and realistic measures on the basis of those principles.

2. The proposed convention should cover (a) prevention, (b) criminalization and law enforcement and (c) international cooperation. As is stipulated in the draft resolution recommended by the Commission on Crime Prevention and Criminal Justice at its resumed tenth session to be approved by the Economic and Social Council for adoption by the General Assembly,[1] a "multidisciplinary approach" should be the guiding principle of the proposed convention. Therefore, the above-mentioned three pillars are equally important to address the multifaceted aspects of the fight against corruption.

3. The proposed convention should provide not only for international cooperation but also for an effective framework to strengthen each State's capacity to fight corruption, bearing in mind that it is primarily the responsibility of each State to establish and maintain good governance.

II. Points for consideration

A. Prevention

4. As mentioned above, preventive measures are important elements in the proposed convention, as they would ensure a multidisciplinary approach to the complex and multifaceted problem of corruption. These measures, however, should not be imposed on States parties in a categorical manner, but their introduction

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should be encouraged in accordance with each State's basic legal and administrative system, where such measures may contribute to the prevention of corruption.

5. The points listed below should be considered in the preparation of the convention.

1. Management of non-elected general public officials

6. The management of personnel in the public service varies widely from country to country and regulations applied to public officials in general are not necessarily suitable for regulating the conduct of public officials of special categories such as cabinet ministers and ambassadors. Provisions regarding the management of public officials should therefore not be drafted in an excessively rigid manner so as to allow each State party to implement them in an appropriate manner in accordance with its legal and administrative system.

7. By the same token, it would not be appropriate for the convention to require non-elected public officials to disclose their income, assets and debts, for reasons of practicality and privacy.

8. On the basis of this proposal, the following factors could be considered:

(a) *Hiring, promotion and guarantee of status*, for example, merit-based hiring, promotion and dismissal based on objective criteria;

(b) *Working conditions*, for example, ensuring proper means to achieve and/or sustain adequate working conditions, including remuneration.

2. Measures to ensure proper management and transparency of legal persons

9. Measures could include establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons; establishment of proper criteria for disqualification of directors of legal persons; establishment of measures to ensure outside inspection, including, inter alia, establishment of the obligation to maintain proper accounts and application of proper sanctions against falsifications and intentional omissions; and development of proper codes of conduct for attorneys, notaries and accountants (see article 31 of the United Nations Convention against Transnational Organized Crime (the "Organized Crime Convention", General Assembly resolution 55/25, annex I)).

3. Government procurement and subsidies

10. Measures could be introduced to ensure transparency and fairness in procedures concerning government procurement, subsidies, authorization and approval.

4. Disclosure of information

11. Establishment of proper systems of disclosure of information, which contributes to the prevention of corruption, should be encouraged.

5. Public awareness

12. The convention should encourage promotion of public awareness regarding prevention of corruption and establishment of freedom of the media.

6. Judiciary and law enforcement agencies

13. Provisions to ensure independence of the judiciary and to establish fair and impartial law enforcement agencies could be introduced.

B. Criminalization and law enforcement

14. The points listed below should be considered in drafting the provisions regarding criminalization and law enforcement.

1. Basic principles

15. Since the primary objective of the planned convention should be to protect and enhance the integrity of democratic governance, the convention should focus primarily on the most basic and fundamental type of corruption, that is, bribery involving domestic public officials. Since bribery of public officials is already criminalized in almost all countries, steady and effective implementation of existing instruments is far more important than new legislation and creating new categories of criminalization.

2. Definition of bribery

16. The definition of the term "bribery" should follow the example of article 8, paragraph 1, of the Organized Crime Convention in order not to cause unnecessary confusion and the definition of the term "domestic public official" should best follow the example of paragraph 4 of that article.

3. Criminalization of bribery involving foreign public officials

17. Japan believes that bribery involving foreign public officials should be carefully considered.

18. In the case of active bribery, the issue is already covered by the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development.

19. In the case of passive bribery, if all States criminalize passive bribery of their own public officials, there will be no loopholes to begin with. In addition, passive bribery by foreign public officials may cause serious conflict with state immunity, as well as the privileges and immunities granted to members of diplomatic missions and consular posts. Effective investigation of and law enforcement against foreign public officials can be difficult in practice.

4. Criminalization of bribery involving officials working in international organizations

20. The privileges and immunities of officials of international organizations should be taken into consideration because of their special nature. It should also be borne in mind that effective investigation of and law enforcement against officials of international organizations can be difficult in practice because of their privileges and immunities. By the same token, the definition of the term "official of an

international organization" should also be considered carefully and the issue of jurisdiction should be examined.

5. Criminalization of bribery involving officials of political parties

21. The structure and legal status of political parties as well as their political and social influence may differ from country to country. In this sense, the question of bribery involving officials of political parties cannot be discussed on the same footing as that involving other officials. Therefore, Japan does not believe that this matter is suited to categorical and legal regulation by an international convention.

6. Criminalization of bribery in the private sector

22. Standard criminalization of all acts of bribery in the private sector without examining any distinction among them is not an appropriate approach.

23. The issue seems to contain two questions at different levels, firstly, the question of the treatment of private entities that provide public services but belong to the category of "private sector" can be addressed by defining "public official" following the example of article 8, paragraph 4, of the Organized Crime Convention. Secondly, as regards the real private sector, it should be borne in mind that the main target of the convention is corruption in the public sector and that criminalization in the private sector cannot be discussed in the same way as that in the public sector.

7. Corruption other than bribery

24. The word "corruption" is sometimes also associated with embezzlement, misappropriation and breach of trust. However, the protected legal interest of those crimes is property rights, while that of bribery is public integrity. Therefore, it is not appropriate to include such property crimes in the scope of the "corruption" in the planned convention.

8. Return of funds of illicit origin derived from corruption

25. The most difficult issue behind this question is how to settle complex and complicated issues regarding legitimate property rights over proceeds of corruption, in other words, how to keep the interests of bona fide third parties.

26. In addition, the question of state immunity and ways and procedures for implementing the return should be carefully considered.

9. Criminal procedures

27. In view of the difficulties of investigation and prosecution given the nature of bribery offences (which are usually committed privately or secretly), the introduction of the following criminal procedures could be considered:

(a) *Mitigation of punishment and immunity from prosecution*. It is necessary to consider whether or not provisions should be included regarding mitigation of punishment and immunity from prosecution;

(b) *Rules of evidence*. Provisions concerning admissibility of the record of examination of witnesses made in foreign countries could be included.

10. Assistance to and protection of victims

28. Although article 25 of the Organized Crime Convention provides for protection of victims, typical bribery cases involve no victims to whom compensation should be made and whose views should be presented in criminal proceedings. Japan therefore thinks that provisions dealing with assistance to and protection of victims should be considered carefully.

C. International cooperation

29. Provisions regarding exchange of information, assistance to developing countries, including technical assistance, cooperation with relevant international organizations, including development agencies, and implementation of the instrument and monitoring thereof could be considered.

Notes

[1] *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/2001/30/Rev.1), part two, chap. I, sect. A, draft resolution I).